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Supreme Court, U.S.
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No. 02-1624

In The

SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON

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I.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AND BECAUSE THIS CASE IS ONE OF NATIONAL IMPORTANCE.

In their Petition for a Writ of Certiorari, Elk Grove Unified School District ("EGUSD") and David W. Gordon asked this Court to review the Ninth Circuit's decision that an EGUSD policy requiring teachers to lead willing students in reciting the Pledge of Allegiance ("Pledge") violates the Establishment Clause of the First Amendment to the United States Constitution. Petitioners also pointed out that the Ninth Circuit's ruling implicitly finds the Pledge to be unconstitutional. (Pet., 6-7.)

In requesting review, Petitioners argued that review is warranted because the Ninth Circuit decision conflicts with that of the Seventh Circuit in Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992) (Pet., 7-8) as well as the decision of this Court in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). (Pet., 10-11.) Petitioners also argued that review is warranted because of the national importance in determining whether the Pledge is constitutional. (Pet., 15-19.)

The United States of America has also voiced its concern over the Ninth Circuit's ruling in its own Petition for a writ of certiorari wherein it argued for review of the Ninth Circuit's holding that the inclusion of the phrase "under God" in the Pledge violates the Establishment Clause. A multitude of Amicus Briefs have also been filed in support of review of the Ninth Circuit ruling.

Now, in his opposition, Respondent Michael A. Newdow agrees that review is warranted by this Court on the issue of

whether the Pledge is constitutional.[1] In so doing, he agrees that review is appropriate because there is a conflict among the circuits and the case involves a matter of national importance. However, he disagrees with Petitioners as to what the outcome of this review should be as he maintains that the Pledge is unconstitutional.

Specifically, Respondent disputes Petitioners' assertion that this Court has repeatedly acknowledged the Constitutionality of the Pledge with the phrase "under God" included therein. In support of their position, Petitioners cited to various cases decided by this Court wherein the constitutionality of the Pledge has been acknowledged by this Court. For example, in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602-03 (1989), this Court noted that "previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." A number of other decisions issued by this Court also contain explicit references to the Constitutionality of the Pledge. See Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (signaling no constitutional violation in encouraging school children to recite historical documents which contain references to "the Deity" or to sing anthems which include the composer's professions of faith); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J. concurring)(stating that the reference to God in the Pledge is merely a constitutional recognition of the historical fact that our Nation was believed by its founders to have been created under God); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, L., concurring) ("[T]he words 'under God' in the Pledge . . .serve as an acknowledgment of religion."); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (Burger, C.J., for the court)("Other examples of reference to our religious heritage are found . . .in the language

[1] In his opposition, Respondent failed to address the issue of whether EGUSD's policy is in fact constitutional.

"One nation under God," as part of the Pledge of Allegiance to the American flag. That Pledge is recited by many thousands of public school children – and adults–every year."); County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief.)

Respondent argues that these cases in general acknowledge the Pledge contains religious words, but fails to offer any explanation as to why the Pledge contains religious words. The only case he specifically addresses is County of Allegheny. In so doing, Respondent speculates as to why Justice Blackmun wrote, "Our previous opinions have considered in dicta the motto and the pledge characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." Id. at 602-602. Respondent claims that Justice Blackmun's mention that the motto and pledge were considered in dicta suggests that he was not convinced that they are in fact constitutional. However, this interpretation flies in the face of Justice Blackmun's opinion wherein he specifically stated, "We need not return to the subject of 'ceremonial deism" [citation omitted], because there is an obvious distinction between creche displays and references to God in the motto and the pledge." Id.

Rather than address the cases cited above wherein the constitutionality of the Pledge was acknowledged, Respondent instead cites various lines from Establishment Clause opinions authored by the nine current Justices and incorrectly concludes that these lines reveal "the constitutional infirmity of the Act of 1954." (Opp., 5-7.) Each of the quotations indisputably concern Establishment Clause jurisprudence; however, they do not run counter to the position espoused by Petitioners and the United States of America that the Pledge is constitutional. In fact, these quotes do not have anything to do with analyzing the constitutionality of the Pledge whereas the cases cited above all

mention the Pledge by name in recognizing it is constitutional. Moreover, Respondent fails to offer any analysis as to why the quotations require this Court to find the Pledge to be unconstitutional. Because Respondent has failed to establish that there is any case precedent to support his position or that of the Ninth Circuit majority, Petitioner respectfully submits that summary reversal of the Ninth Circuit is appropriate.

If one is to consider prior statements made by the current justices of this Court regarding the constitutionality of the Pledge, Justices Kennedy, O'Connor, Rehnquist, and Scalia have all joined in or authored opinions wherein the constitutionality of the Pledge has been acknowledged. See County of Allegheny, 492 U.S. at 673 (Kennedy, J., dissenting)[2] and Lynch, 465 U.S. at 676[3], among others. Justice Stevens is the only other current justice who was involved in any of this Court's cases wherein the constitutionality of the Pledge has been acknowledged. Thus, if anything, the quotations cited by Respondent attributed to these justices establish that the these Justices understand how to analyze an Establishment Clause case and have utilized that knowledge to repeatedly state that the Pledge does not run afoul of the Establishment Clause.

Respondent also fails to address the analytical flexibility inherent in this Court's decisions in Establishment Clause cases as is seen in cases such as Marsh v. Chambers, 463 U.S. 783, 792 (1983). Instead, Respondent asks this Court to adopt an approach that would require the elimination of all references to religion and/or the creator that run through our laws, ceremonies and, even, our currency. This Court, though, has repeatedly stated that the Establishment Clause does not require such a drastic result.

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[2] Justice Scalia concurred with Justice Kennedy's dissent.

[3] Chief Justice Rehnquist and Justice O'Connor joined in the majority decision wherein the constitutionality of the Pledge was discussed.

(*See*, Zorach v. Clauson, 343 U.S. 306, 313 (1952).

As this Court has repeatedly acknowledged the constitutionality of the Pledge, Petitioners respectfully submit that review of the Ninth Circuit ruling is necessary and appropriate. Moreover, Petitioners submit that summary reversal is appropriate based on the repeated statements of this Court regarding the constitutionality of the Pledge.

II.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS APPROPRIATE AS TO WHETHER RESPONDENT HAS STANDING.

Respondent opposes review of the Ninth Circuit's decision that he has standing to pursue the constitutionality of the Pledge claiming that he retains interests and rights in directing his daughter's education. (Opp., 8.) Specifically, he claims he is charged with protecting her from harm and thus has a right to "vindicate his own interest in safeguarding her welfare." (Opp., 9.) What he fails to address in this context is how a child hearing the Pledge being recited by other schoolchildren implicates the need to safeguard her from harm -- especially when he does not have the right to determine what education she receives.

Additionally, Respondent in essence asks this Court to preempt state custody laws and find that he has standing to bring the instant lawsuit despite the fact he admittedly does not have legal custody of his daughter. Family relations are traditionally an area of state concern. H.C. v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000). States have a vital interest in protecting the authority of their judicial system so that their orders are not rendered null. Id. Thus, the state court order awarding sole legal custody to the mother of Respondent's daughter should be given the force and effect to which it is entitled.

In his opposition brief, Respondent acknowledges that he does not have legal custody of his child which, under California law, means he does *not* have the ability to affect decisions regarding the health, welfare *or education* of his daughter. Cal. Family Code sections 3003 and 3006. Thus, to the extent the Ninth Circuit believes the Pledge to be "religious education," Respondent has absolutely no right to affect decisions in that area with respect to his daughter. Consequently, he does not have a right to vindicate his own interest in safeguarding her welfare in this context.

Since Respondent does not have the ability to affect his daughter's education, Petitioners respectfully submit that review of the Ninth Circuit's decision regarding Respondent's standing to bring the instant action is appropriate.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted. Petitioners also submit that summary reversal of the Ninth Circuit's decision is appropriate in this case.

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Respectfully submitted,

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